

THE TOP-FOUR PRIMARY AND ALASKA BALLOT MEASURE 2

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ABSTRACT

This Primer provides an overview of the debate surrounding non-partisan ranked primaries. In the November 2020 election, Alaskan voters decided whether to adopt Ballot Measure 2 which, among other reforms, would introduce a top-four primary system. Under this system, the top-four vote-getters in the primary election, regardless of partisan affiliation, would advance to the general election. Supporters of the reform argue it offers voters more choices, fosters competition, creates a more representative pool of candidates, and avoids vote splitting. Opponents contend that such a system reduces representation by possibly preventing political parties from participating in general elections. Alaska will not be the first state to adopt a top-rank primary system; the debate over Ballot Measure 2 is just another chapter in the historical dialogue over voting reform.

I. INTRODUCTION

Among the decisions Alaskans confronted in the 2020 election was whether or not to adopt a top-four primary system.¹ The top-four primary proposal was part of Alaska Ballot Measure 2,² and was described as

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1. ALASKA DIV. OF ELECTIONS, AN ACT REPLACING THE POLITICAL PRIMARY WITH AN OPEN PRIMARY SYSTEM AND RANKED-CHOICE GENERAL ELECTION, AND REQUIRING ADDITIONAL CAMPAIGN FINANCE DISCLOSURES, https://www.elections.alaska.gov/petitions/19AKBE/19AKBE_Ballot_Summary_FINAL.pdf.

2. Alaska Ballot Measure 2 also includes provisions (a) requiring persons and entities that make political contributions of more than \$2,000 that were themselves derived from donations, contributions, dues, or gifts to disclose the legal source of the contributions and (b) establishing ranked-choice voting for general elections. *Id.* For analysis of the ranked choice voting aspect of Ballot Measure 2, see Angela Sbanio, *How Should Alaskans Choose?: The Debate Over Ranked*

follows on the ballot:

This act would get rid of the party primary system, and political parties would no longer select their candidates to appear on the general election ballot. Instead, this act would create an open nonpartisan primary where all candidates would appear on one ballot. Candidates could choose to have a political party preference listed next to their name or be listed as “undeclared” or “nonpartisan.” The four candidates with the most votes in the primary election would have their names placed on the general election ballot.³

Ultimately, the ballot measure was adopted by a slim margin of around 4,000 votes.⁴ Adoption of the measure makes the Last Frontier the first state to utilize a top-four primary system for state or federal elections.⁵ This Primer intends to facilitate debate over Alaska Ballot Measure 2 and provide context on the ramifications of adopting a top-four primary system. Section II provides a brief introduction to top-four primaries by describing the arguments for and against top-four primaries.⁶ Next, Section III reviews the electoral history of ballot initiatives proposing the adoption of top-rank primary systems. To conclude the piece, Section IV presents closing thoughts on the fate of the top-four primary proposal.

Choice Voting, 37 ALASKA L. REV. 291 (2020).

3. *Id.*

4. Kelsey Piper, *Alaska voters adopt ranked-choice voting in ballot initiative*, VOX (Nov. 19, 2020), <https://www.vox.com/2020/11/19/21537126/alaska-measure-2-ranked-choice-voting-results>.

5. Primary systems vary both by state and state party. In some states, including Alaska, one or more parties use one primary system, while other parties use another system. In 22 states, at least one political party currently utilizes an open primary system. At least one party uses a closed primary system in 14 states and the District of Columbia. Semi-closed primaries are present in 15 states, while 3 states have top-two primaries. *Primary Election Types by State*, BALLOTPEDIA, https://ballotpedia.org/Primary_election_types_by_state. Washington and California currently have primary systems that resemble the one proposed in Ballot Measure 2. In both instances, the states feature top-two primaries where the top two candidates, regardless of party, advance to the general election. *See infra* Section III.

6. This Primer uses the term “top-ranked primary systems” as an umbrella term for primary systems in which a set number of the top vote-getters in the primary are advanced to the general election regardless of party affiliation. Types of top-ranked primary systems include top-four and top-two primaries.

II. ARGUMENTS FAVORING AND OPPOSING A TOP-FOUR PRIMARY SYSTEM

A. Arguments in Favor of Top-Four Primary Systems

There are four core arguments in favor of top-four primary systems: They (a) offer voters more choices, (b) foster more competition between candidates, (c) create a more representative pool of candidates, and (d) avoid “vote splitting.”⁷ Top-four primaries offer voters more choice because they make it easier for Independent and third party candidates to make it onto the general election ballot alongside traditionally dominant Democrat and Republican candidates.⁸ The representation of “a broader spectrum of opinion” in general elections “ensures that many more voters will have the opportunity to vote for a candidate they support.”⁹ For these same reasons, top-four primaries foster more competition among candidates.¹⁰ Relatedly, top-four primaries can create a more representative pool of candidates in the general election by mitigating the outsized role of primary voters, a cohort that tends to be less representative of the electorate than general election voters.¹¹ This is achieved by ensuring primary voters are unable to “eliminate otherwise viable candidates” supported by general election voters.¹² Finally, top-four primaries avoid vote splitting by ensuring that so long as a candidate receives more than 20% of the primary vote, they will advance to the general election.¹³ As a result, viable candidates are unlikely to be left out of the general election.¹⁴

Supporters of Alaska Ballot Measure 2 have emphasized the importance of arguments (a) and (c). In the official Statement in Support of the initiative, the co-chairs of Alaskans for Better Elections argue that “[n]o Alaskan should be denied a vote just because they don’t want to be affiliated with Republican or Democratic parties.”¹⁵ Along these lines,

7. *Top Four*, FAIR VOTE, https://www.fairvote.org/top4#why_top_four. “Vote splitting” occurs when the vote share is distributed such that neither the first nor second-place vote-getters are representative of a majority of votes. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*; see also David W. Brady et al., *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 LEGIS. STUDIES Q. 79, 81–84 (2007) (explaining how in primaries candidates are “forced to please their primary-election constituency by positioning themselves away from the median voter”).

12. FAIR VOTE, *supra* note 7.

13. *Id.*

14. *Id.*

15. ALASKA DIV. OF ELECTIONS, OFFICIAL ELECTION PAMPHLET REGION 1, at 105 (2020),

supporters of the measure contend that the partisan primary system allows political parties to choose who can vote in primaries, which leads to more politically extreme nominees in general elections, thus “disenfranchis[ing] non-partisan voters.”¹⁶

B. Arguments Against Top-Four Primary Systems

Opponents of top-four primaries propound an argument which wholly rejects the contentions made by supporters of the system: Opponents argue that top-four primaries reduce representation.¹⁷ Former U.S. Senator Mark Begich and former Governor Sean Parnell warned in their Statement in Opposition to Ballot Measure 2 that the initiative will introduce a “Jungle Primary.”¹⁸ They claim this system will make it possible for four candidates from a single political party to advance to the general election, thus “shutting out the other political parties from even appearing on the ballot.”¹⁹

III. THE HISTORY OF TOP-RANK PRIMARY BALLOT MEASURES

Approval of Ballot Measure 2 makes Alaska the first state to adopt a top-four primary system.²⁰ However, Alaska is not the first state to adopt a top-rank primary system via popular vote. In 2004, Washington was the first state to adopt a top-two primary through a ballot initiative.²¹ After a failed effort to pass an initiative implementing a blanket primary in 2004,²² California enacted a top-two primary system based on a successful

https://www.elections.alaska.gov/election/2020/General/OEPBooks/2020%20AK%20Region%20I%20pamphlet_FINAL-web.pdf.

16. *Id.*

17. *Id.* at 106.

18. *Id.*

19. *Id.* This concern has been expressed outside of Alaska. In California’s 2016 general election, despite operating within an open top-two primary system, voters had to choose between two Democrats for a seat in the U.S. Senate: then-Attorney General Kamala Harris and then-Congresswoman Loretta Sanchez. Elena Schneider, *Democrats Harris, Sanchez Advance to California Senate Election*, POLITICO (June 8, 2016), <https://www.politico.com/story/2016/06/kamala-harris-loretta-sanchez-california-senate-224051>.

20. BALLOTPEDIA, *supra* note 5.

21. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 444 (2008); *see also The Top Two Primary, Initiative 872*, WASH. SEC’Y OF STATE, <https://www.sos.wa.gov/elections/wac.aspx>.

22. Proposition 62 would have provided for “a single primary ballot in which all state and congressional candidates appear[ed] together, regardless of party affiliation.” The measure was defeated with only 53.9% of voters voting against it. *Proposition 62*, INST. OF GOVERNMENTAL STUDIES (Nov. 2, 2004), <https://igs.berkeley.edu/library/elections/proposition-62>.

2010 ballot measure.²³ Thus far, Washington and California voters are the only to adopt such initiatives; ballot measures proposing top-two primaries in Arizona²⁴ and Oregon²⁵ have failed.

Perhaps the most significant legal moment in the recent history of top-rank primaries is the case *Washington State Grange v. Washington State Republican Party*.²⁶ In the aftermath of Washington State enacting a top-two primary, the state Republican Party, joined by the Washington State Democratic Party and the Libertarian Party of Washington State, filed suit claiming the system violated their associational rights by “usurping” the parties’ rights to nominate their own candidates and forcing them to associate with candidates they did not endorse.²⁷ The U.S. Supreme Court rebuffed the contention that the top-two primary allowed non-partisan voters to determine political parties’ candidates as the system merely “winnow[ed] the number of candidates to” two for the general election.²⁸ The Court was further unconvinced by the argument that the system burdened the associational rights of parties “because voters will assume that candidates on the general election ballot are the nominees of their

23. Proposition 14 proposed a single ballot for congressional, statewide, and state offices. All voters, regardless of party, would be able to vote for any of the candidates running for the affected offices. “The two candidates with the highest number of votes in the primary election – regardless of their party preference – would advance to compete in the general election.” *Proposition 14*, CAL. LEGIS. ANALYST’S OFF. (Feb. 18, 2010), https://lao.ca.gov/ballot/2010/14_06_2010.aspx. The initiative passed with 53.73% of the vote. Debra Bowen, CAL. SEC’Y OF STATE, STATEMENT OF VOTE, JUNE 8, 2010 STATEWIDE DIRECT PRIMARY ELECTION, <https://web.archive.org/web/20100722063405/http://www.sos.ca.gov/elections/sov/2010-primary/pdf/2010-complete-sov.pdf>.

24. On the ballot in 2012, Proposition 121 would have enacted an open top-two primary. PROPOSITION 121, <https://apps.azsos.gov/election/2012/info/PubPamphlet/english/Prop121.htm>. The measure was rejected by voters. Howard Fischer Capitol Media Servs., *Prop. 121: Plan To Change the way Primaries Work Rejected; Outside Funds are Cited*, TUSCON.COM (Nov. 7, 2012), https://tucson.com/news/local/govt-and-politics/elections/prop-121-plan-to-change-the-way-primaries-work-rejected-outside-funds-are-cited/article_3444db63-7ce7-5953-b29f-2d64e1b82862.html.

25. Oregon’s voters have twice rejected ballot measures proposing top-two primaries, first in 2008 and then again in 2014. OR. SEC’Y OF STATE, OFFICIAL RESULTS 43 (2008), <http://records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/6873598> (voting results for Measure 65); OR. SEC’Y OF STATE, OFFICIAL ABSTRACT OF VOTES 30 (2014), <http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/6873735> (voting results for Measure 90); *see also* OR. SEC’Y OF STATE, VOTERS’ PAMPHLET MEASURES 132 (2008), <http://records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/6873619> (describing Measure 65); Peter Wong, *Numbers Assigned to State Measures*, PORTLAND TRIB. (Aug. 1, 2014), <https://pamplinmedia.com/pt/9-news/228987-92294-numbers-assigned-to-state-measures> (describing Measure 90).

26. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008).

27. *Id.* at 448.

28. *Id.* at 452–53.

preferred parties.”²⁹ In expressing its disagreement with this point, the Court noted there was “no basis to presume that a well-informed electorate would interpret a candidate’s party-preference designation to mean that the candidate is the party’s chosen nominee.”³⁰ The dissent disagreed with this last point, arguing that the top-two primary system would force “a party to be associated with candidates who may not fully (if at all) represent its views,” thus undermining vital aspects of political association.³¹ Even at the highest level of legal dispute in the nation, it appears that there is no consensus over the effects of top-rank primaries on the electorate.

IV. CONCLUSION

In the 2020 election, Alaskans chose to drastically alter the administration of elections in the state by adopting a suite of reforms including a top-four primary system. With persuasive arguments on both sides of the debate and a dearth of similar voting systems to compare the proposal with, Ballot Measure 2 has situated Alaska at the heart of the national debate on how to run modern elections. Despite its recent adoption, Ballot Measure 2 has already contributed to the national discussion on how to ensure the choice presented to voters on Election Day is representative and democratic.

29. *Id.* at 454.

30. *Id.*

31. *Id.* at 462 (Scalia, J., dissenting).